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In the Supreme Court of the United States

OCTOBER TERM, 1991

GRUMMAN AEROSPACE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Federal Acquisition Regulation 33.207 (c)(2), 48 C.F.R. 33.207(c)(2), which describes the officials of a corporate government contractor who may certify claims for payment under the contract, is a valid implementation of the Contract Disputes Act, 41 U.S.C. 605(a), which provides that "the contractor shall certify" all claims exceeding $50,000.

2. Whether the contractor's failure to submit a properly certified claim for payment to the contracting officer deprived the contracting officer of jurisdiction to act upon the claim and deprived the Armed Services Board of Contract Appeals of jurisdiction to review the contracting officer's decision.

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OPINIONS BELOW

The decision of the court of appeals on rehearing (Pet. App. 1a-17a) is reported at 927 F.2d 575. The initial decision of the court of appeals (Pet. App. 40a-41a) is noted at 918 F.2d 185 (Table). The decision of the Armed Services Board of Contract Appeals (Pet. App. 18a-39a) is reported at 90-1 B.C.A. (CCH) ¶ 22,417.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1991. The petition for a writ of certiorari was filed on May 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Petitioner, a government contractor, sought reimbursement under its cost reimbursable contracts for dividends paid to its employees. The dividends were paid on restricted shares of the stock of petitioner's parent, Grumman Corporation, under Grumman's Restricted Stock Award Plan.[1] The Defense Contract Audit Agency disapproved reimbursement of these dividend payments under 43 of petitioner's contracts. Pet. App. 2a.

Pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 605(c)(1), petitioner then submitted an uncertified claim to the Navy's contracting officer for $48,707. C.A. Paladino, petitioner's senior vice president and treasurer, later purported to certify the claim.[2] The contracting officer denied the claim, holding that the dividends were not compensation for services rendered under the contracts. Pet. App. 2a-3a, 19a-20a.

Petitioner then appealed to the Armed Services Board of Contract Appeals (ASBCA or Board), which held that the dividends were recoverable costs under petitioner's contracts. Pet. App. 18a-39a. In

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[1] Recipients of the restricted stock cannot sell or transfer it for a specified period, usually five years. If a recipient leaves the employment of Grumman and its subsidiaries during this period, the restricted stock is forfeited, subject to specified exceptions. As long as the recipient holds the stock, however, he has the same right as other shareholders to vote the shares and to receive dividends declared by Grumman's board of directors. Pet. App. 21a-23a.

[2] Only claims exceeding $50,000 must be certified pursuant to 41 U.S.C. 605(c)(1). Although its initial claim was just under the amount, petitioner acknowledges that "[t]he dispute implicated * * * several hundred thousand dollars per year" (Pet. 6), and does not argue that its claim did not need to be certified.

addition to arguing that the costs were not recoverable, the government had moved to dismiss the appeal on the ground that Paladino was not a proper official to certify petitioner's claim under Federal Acquisition Regulation (FAR) 33.207(c)(2), 48 C.F.R. 33.207. That regulation requires claims made by corporate contractors to be certified by "[a] senior company official in charge at the contractor's plant or location involved" or by "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs." 48 C.F.R. 33.207(c)(2)(i) and (ii). In denying the motion to dismiss, the Board held that Paladino was a proper official to make the certification, based upon its findings that "[a]t the time of certification, [his] functions included overall responsibility for [petitioner's] financial affairs" and he "report[ed] directly to the President of [petitioner]." Pet. App. 20a, 21a, 33a.

On the government's appeal, the Federal Circuit vacated and remanded the Board's decision with directions to dismiss for lack of jurisdiction. Pet. App. 1a-11a. The court of appeals first held (*id.* at 4a) that the certification regulation validly implements the Contract Disputes Act of 1978, which requires that "the contractor shall certify" claims exceeding $50,000. 41 U.S.C. 605(c)(1). The court also held that "[t]he regulation is clearly within the congressionally delegated authority of the Office of Federal Procurement Policy 'to issue guidelines with respect to criteria for the . . . functions . . . of the agency boards . . .' that 'may be necessary or desirable to carry out the provisions of this chapter . . . .' 41 U.S.C. § 607(h) (1988)." Pet. App. 5a. Relying upon its past precedents, the court further held that "the certification requirement is a jurisdictional pre-

requisite" to the appeal of a contracting officer's decision. *Id.* at 7a.

The court held that Paladino was not a proper official to certify petitioner's claim because he was neither "[a] senior company official in charge at the contractor's plant or location involved" nor "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs." Pet. App. 9a, quoting 48 C.F.R. 33.207 (c)(2)(i) and (ii). Paladino, the court found, failed to satisfy the first test because, although he was a "senior official," he was not "in charge" since he could not pursue the claim without the approval of another official. *Ibid.* The alternative test was not met, the court found, because petitioner "ha[d] not met its burden of establishing that Mr. Paladino had the overall responsibility for the conduct of [the] affairs required by the regulation." Pet. App. 10a.

Finally, the court noted that petitioner was not without a remedy. Pet. App. 11a. It observed that at any time over the past three years, petitioner could have submitted a properly certified claim. *Ibid.* The court added that petitioner could still submit a properly certified claim to the contracting officer, and if denied relief could appeal either to the Board or the Claims Court. *Ibid.*

Four judges of the court of appeals dissented from the court's refusal to rehear the case en banc. In their view, the certification regulation is invalid because "[t]he statute delegates *to the contractor* the power to designate who speaks for it." Pet. App. 15a. Furthermore, the dissenters stated that, notwithstanding the Federal Circuit's longstanding precedents to the contrary, the failure to certify a claim properly should not be held to be a jurisdictional de-

fect, but rather a failure to state a claim for relief. *Id.* at 16a-17a.

ARGUMENT

The decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, with one narrow exception, Congress has conferred exclusive jurisdiction upon the Federal Circuit to review disputes under the Contract Disputes Act of 1978, 41 U.S.C. 607(g),[3] thereby establishing it as the specialized and expert tribunal to resolve issues of the kind presented here. Further review of this case is therefore not warranted.

1. a. The court of appeals correctly held that the certification regulation, FAR 33.207(c)(2), validly implements the Contract Disputes Act of 1978. The Act provides:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

41 U.S.C. 605(c)(1).

The implementing regulation, FAR 33.207(c)(2), provides:

> If the contractor is not an individual, the certification shall be executed by—
>
> > (i) A senior company official in charge at the contractor's plant or location involved; or

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[3] The sole exception is that decisions of the TVA Board of Contract Appeals are reviewable in district court. 41 U.S.C. 607(g)(2).

> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

48 C.F.R. 33.207(c)(2).

Petitioner (Pet. 15-16, 18) and the dissenting judges below (Pet. App. 14a-15a) maintain that because the Act provides only that "the contractor" shall certify claims, it follows that the contractor is free to designate whomever it wants to make the certification and that the regulation is an invalid restriction on that right. The Federal Circuit correctly rejected that argument.

As the court below recognized (Pet. App. 4a-5a), the statute is silent on the question of who may certify a claim for a corporate contractor. The court properly applied *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in holding that this silence does not preclude agency regulation, but rather "leaves a gap" that the agency can fill so long as its regulation is not "arbitrary, capricious, or manifestly contrary to the statute." Pet. App. 5a, quoting *Chevron*, 467 U.S. at 843-844.[4]

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[4] Petitioner also contends that, even if the regulation is valid, the Federal Circuit's construction of it is unduly restrictive. Pet. 13-15. The court below, however, was manifestly correct in holding that Paladino does not meet either test of FAR 33.207(c)(2). Petitioner does not contest the court's holding that Paladino fails the first test because he was not "in charge at the contractor's plant or location involved." 48 C.F.R. 33.207(c)(2)(i). Petitioner does contend (Pet. 15) that Paladino meets the second test, *i.e.*, that he is "[a]n officer * * * having overall responsibility for the conduct of the contractor's affairs." 48 C.F.R. 33.207(c)(2)(ii). Petitioner's own controller testified, however, that he, not Paladino, "made the ultimate decision to present the claim" and that Paladino, his subordinate, could not pursue

The certification regulation and the Federal Circuit's application of it in this case are consistent with the importance of certification under the Contract Disputes Act of 1978. Submission of fraudulent claims subjects a contractor to possible forfeiture of the claim (41 U.S.C. 604), civil monetary sanctions (31 U.S.C. 3729), debarment (see 10 U.S.C. 2302(3), 2305(b)(3); 41 U.S.C. 403(7); 48 C.F.R. 9.406-2)), and imprisonment (18 U.S.C. 287, 1001). In view of these serious consequences, the certification regulation appropriately requires that a high-level official within a corporate contractor execute the certification.

The Federal Circuit's holding is also consistent with that court's past precedents, which provide guidance to contractors as to who must certify claims. In *Ball, Ball & Brosamer, Inc.* v. *United States*, 878 F.2d 1426 (1989), for example, the Federal Circuit held that a contractor's chief cost engineer could not certify claims for more than $50,000 because he did not satisfy either test of FAR 33.207. In that case, the court specifically rejected the argument, repeated by petitioner in this case, that any officer authorized by the contractor to certify claims on its behalf can execute a valid certification for purposes of the Contract Disputes Act of 1978. 878 F.2d at 1428.[5]

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the claim without his approval. Pet. App. 9a. This testimony, which petitioner does not address, is fatal to petitioner's argument that Paladino met either test of Far 33.207 (c)(2). In any event, whether Paladino has "overall responsibility for the conduct of [petitioner's] affairs" is not a question warranting review by this Court.

[5] Petitioner argues (Pet. 13-15, 17-18) that the court's interpretation of FAR 33.207(c)(2) means that only *the* plant manager or only *the* chief executive officer of a corpor-

b. Petitioner also argues (Pet. 19-22) that the Office of Federal Procurement Policy (OFPP) lacked authority to issue the certification regulation and, in any event, that the OFPP's construction of the Contract Disputes Act of 1978 is not entitled to deference. These arguments lack merit.

The OFPP was established in 1974 as part of the Office of Management and Budget by the Office of Federal Procurement Policy Act, 41 U.S.C. 401 *et seq.* The Act authorized the Administrator of the OFPP to prescribe procurement regulations and procedures that are binding upon Executive agencies. Pub. L. No. 93-400, 88 Stat. 797. The Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, was enacted four years later. It establishes a uniform contract claims procedure by providing that contractors shall submit all claims in writing to a contracting officer. 41 U.S.C. 605(a). A contractor can appeal the decision of the contracting officer either to an agency board of contract appeals (41 U.S.C. 606) or to the Claims Court (41 U.S.C. 609(a)). Either the contractor or the government can then appeal the decision of the board of contract appeals or the Claims Court to the Federal Circuit. 41 U.S.C. 607 (g); 28 U.S.C. 1295.

The Contract Disputes Act of 1978 authorizes the OFPP "as may be necessary or desirable to carry out the provisions of [the Act], to issue guidelines with respect to criteria for the establishment, functions,

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ation can certify a claim. The court below dismissed this argument as a "gross[] exaggerat[ion]" of its holding. Pet. App. 10a. In a subsequent case, the court held that the executive vice president of a corporate contractor had the necessary overall responsibility. *United States* v. *Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996 (Fed. Cir. 1991).

and procedures of the agency boards (except for [the TVA] board)." 41 U.S.C. 607(h). As petitioner notes (Pet. 20-21), "guidelines" was substituted for "rules and regulations" by an amendment on the Senate floor. See 124 Cong. Rec. 36,266 (1978). While guidelines lack the binding effect of legislative rules, they are nonetheless entitled to deference as the agency's interpretation of the statutory certification requirement. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976). The Federal Circuit properly upheld the certification regulation under the OFPP's authority to issue guidelines.

The OFPP, however, has been given additional power to issue regulations that provides more direct authority for the certification regulation. The OFPP Administrator is authorized "to promulgate a single, simplified, uniform Federal procurement regulation." 41 U.S.C. 405(a). Following notice and comment (44 Fed. Reg. 5218, 5224 (1979)), OFPP issued Policy Letter 80-3, which requires Executive agencies to amend their procurement regulations to include, among other provisions, the claims-certification requirement. 45 Fed. Reg. 31,035, 31,036-31,037 (1980).

The Federal Acquisition Regulation, including the claims-certification regulation, was then issued in 1983 jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration. 48 Fed. Reg. 42,101, 42,348 (1983). The claims-certification regulation is therefore independently supported by those officials' own statutory authorizations to issue procurement regulations.[6] The

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[6] Part 33 of 48 C.F.R., which includes the relevant regulation, states that it was issued under the authority of 40

regulation, therefore, has ample statutory support and is entitled to deference under *Chevron*.[7]

2. Petitioner also argues (Pet. 22-27) that the Federal Circuit erred by treating the failure to file a properly certified claim as a jurisdictional defect. Regardless of whether that defect was jurisdictional or, as the dissent below would have held (Pet. App. 16a-17a), merely a failure to state a claim for which relief can be granted, petitioner can and must refile its claim, properly certified, to recover.[8] To be sure, jurisdictional arguments can be raised at any time in the proceedings, while merits arguments are waived if not timely raised. In this case, however, the government moved for dismissal of the appeal on the basis of the faulty certification, and the Board considered that motion on its merits rather than reject-

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U.S.C. 486(c), 10 U.S.C. ch. 137, and 42 U.S.C. 2473(c). The first of those statutes gives the Administrator of GSA broad authority to "prescribe such regulations as he deems necessary to effectuate his functions under" the Federal Property and Administrative Services Act of 1949. Chapter 137 of 10 U.S.C. governs procurement by the Department of Defense and hence governs petitioner's contracts. NASA's Administrator is authorized to issue "regulations governing the manner of [NASA's] operations and the exercise of the powers vested in it by law." 42 U.S.C. 2473(c)(1).

[7] In its present form, the OFPP Act expressly authorizes the OFPP Administrator to "prescribe Government-wide procurement policies," which "shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation." 41 U.S.C. 405(a).

[8] Petitioner can refile its claim because no statute of limitations restricts the time for a contractor to present a claim to the contracting officer under the Contract Disputes Act of 1978, although the doctrine of laches is applicable. *Travelers Indemnity Co.* v. *United States*, 16 Cl. Ct. 142, 151-152, 154-158 (1988).

ing it as untimely. Pet. App. 33a.[9] The disagreement between the majority and dissent below, therefore, did not affect the outcome of this case.

In any event, the Federal Circuit has consistently and correctly held that proper certification is a jurisdictional prerequisite to bringing a claim.[10] The Contract Disputes Act of 1978 is a waiver of sovereign immunity. *Sigmon Fuel Co.* v. *Tennessee Valley Auth.*, 754 F.2d 162, 165 (6th Cir. 1985); *Erickson Air Crane Co. of Washington, Inc.* v. *United States*, 731 F.2d 810, 813 (Fed. Cir. 1984). The Federal Circuit has correctly reasoned that neither the contracting officer nor the Board has the power to waive the claims-certification requirement that Congress has imposed, and that the contracting officer lacks authority, *i.e.*, jurisdiction, to issue a decision in the absence of the necessary certification. *W.M. Schlosser Co.* v. *United States*, 705 F.2d 1336, 1338 (1983). See 48 C.F.R. 33.201.

Contrary to petitioner's contention (Pet. 23-24), the claims-certification requirement need not be treated the same as the time limitations in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5 (e), 2000e-16(c), which this Court held are not ju-

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[9] Petitioner contends (Pet. 27) that the government first raised the jurisdictional argument in its post-hearing brief to the Board. But the first entry in the "statement of principal issues" in the government's pre-hearing brief was "[w]hether or not Grumman's claim was properly certified" (at 9); as noted, the Board apparently concluded that the government had raised the issue in timely fashion.

[10] *E.g.*, *Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d at 999; *Ball, Ball & Brosamer, Inc.* v. *United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989); *Theon* v. *United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985); *W.M. Schlosser Co.* v. *United States*, 705 F.2d 1336, 1338 (Fed. Cir. 1983).

risdictional. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1990). Moreover, those cases held that the time limits were subject to equitable tolling so that suit could proceed on the plaintiffs' otherwise proper, but untimely, administrative charge or judicial complaint. In the present case, however, petitioner has not as yet filed a proper claim, so the doctrine of equitable tolling is of no use to it.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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